

Supreme Court of the United States

OCTOBER TERM, 1945

No. 1195

MAY 3 1946

CHARLES ELMORE GRODLEY

JOHN A. JOHNSON & SONS, INC. and AMERICAN SURETY
COMPANY OF NEW YORK,

Petitioners,

—vs.—

THE UNITED STATES OF AMERICA to the use of
BALTIMORE BRICK COMPANY.

No. 1196

JOHN A. JOHNSON & SONS, INC. and AMERICAN SURETY
COMPANY OF NEW YORK,

Petitioners,

—vs.—

JACOB FRIEDMAN, trading as J. FRIEDMAN COMPANY.

**PETITION FOR WRITS OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE FOURTH CIRCUIT AND BRIEF
IN SUPPORT THEREOF**

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Aswel-Law Brief Press, Inc.

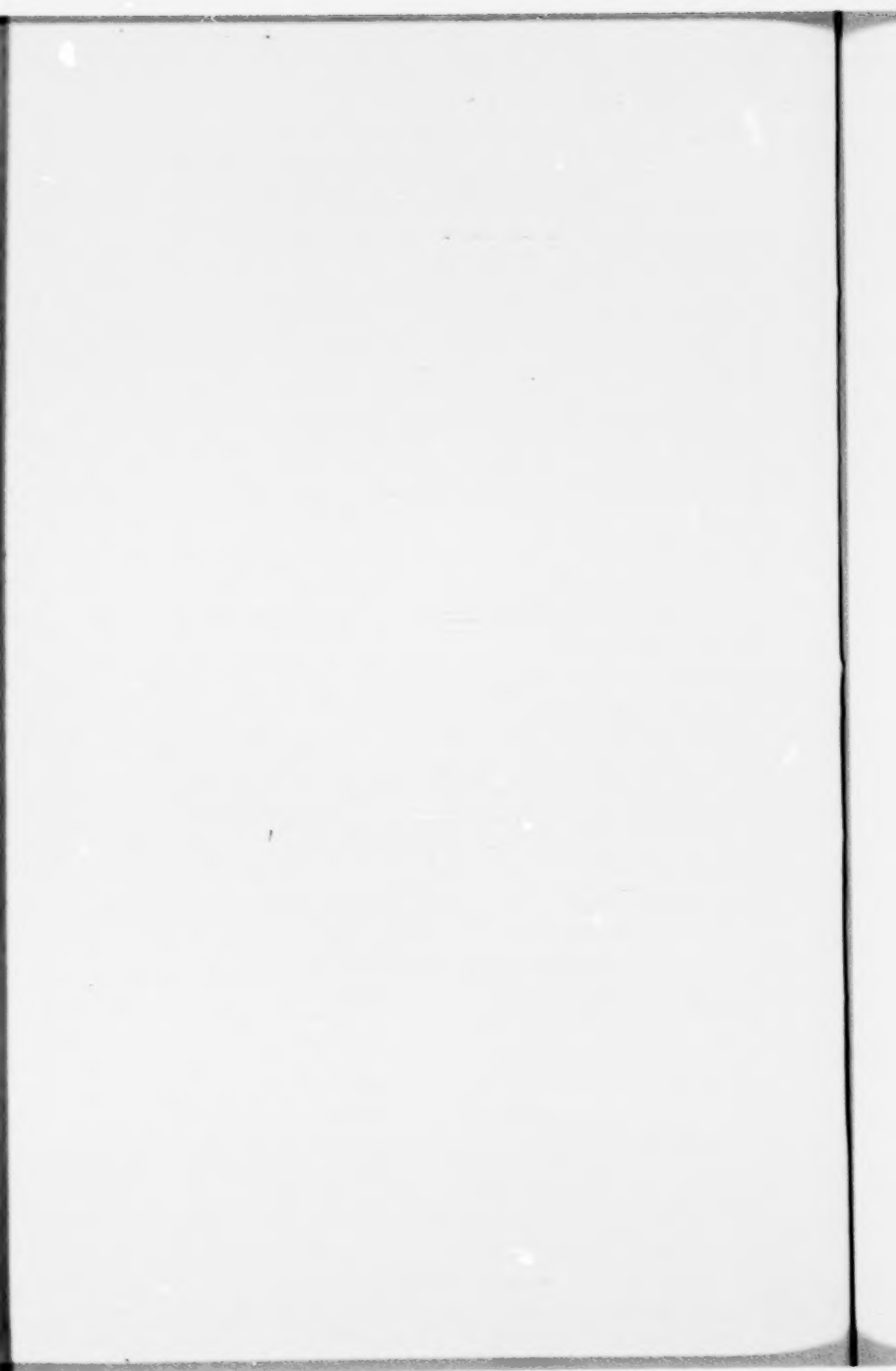


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PETITION

The petition of John A. Johnson & Sons Inc., and American Surety Company of New York, respectfully shows to this Court:

This is a petition for writs of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

On February 6, 1946, orders were made by said Circuit Court of Appeals affirming judgments of the United States District Court for the District of Maryland entered on April

19, 1945, in favor of the United States of America to the use of Baltimore Brick Company against petitioners and Jacob Friedman in the amount of \$5,655.20, with interest and costs of suit, and in favor of Jacob Friedman against petitioners in the amount of \$8,555.40, with interest and costs of suit.

Jurisdiction.

The Jurisdiction of this Court is invoked under Section 240 of the Judicial Code, Act of February 13, 1925.

Statement of the Matters Involved.

Petitioner, John A. Johnson & Sons Inc., (herein referred to as "Johnson") was the general contractor under a contract with the United States of America for the construction of certain buildings at Jarboesville, Maryland. Petitioner American Surety Company of New York (herein referred to as "Surety") was the surety under the Miller Act* bond filed by Johnson for the performance of the contract and for the payment of materials used in the prosecution of the work.

Respondent Jacob Friedman (herein referred to as "Friedman"), was a subcontractor of Johnson for the masonry and concrete work. Respondent, Baltimore Brick Company (herein referred to as "Brick Company") was a materialman of Friedman.

The Brick Company brought an action under the Miller Act in the United States District Court for the District of Maryland against the petitioners and Friedman, for a balance alleged to be due for brick ordered by Friedman in the construction of the buildings. The petitioner and Friedman

* Act of August 24, 1935 c. 642, 49 Stat. 793, 40 U. S. C. Section 270a, et seq.

defended said action on the ground that the brick had been condemned and rejected by the Government for the reason that the brick failed to comply with American Society for Testing Materials (herein referred to as "A. S. T. M.") specifications C62-41T, Grade MW, required by the Government contract, in that the compressive strength of the brick was below the allowable individual minimum of 2200 pounds per square inch (R. 58). At the same time, Friedman instituted an action against petitioners for additional expense in tearing down and replacing the brick work so condemned by the Government and in furnishing higher priced brick. Petitioners defended Friedman's action on the ground that under the provisions of the subcontract, Friedman was bound to the same extent as Johnson by the Government rejecting and condemning the brick.

The actions were tried together in the District Court, the evidence in the Brick Company action being included by stipulation in the Friedman action.

The District Court held in the Brick Company case that the Brick Company was not bound by the Government contract and related specifications which covered the Government project, despite the knowledge brought home to the Brick Company with respect to the use of the brick and no matter what Friedman's obligation with respect to Johnson might be, or with respect to Johnson's obligation to the Government, that it was not material whether the brick met the requirements of the Government contract or not, and that Friedman had failed to sustain the burden of proof of breach of warranty by the Brick Company (R. 4-7).

The Circuit Court of Appeals referred to the Government test showing that the brick did not conform to the specifications, but rejected such test as determinative (Rec. 6, 7) and sustained the District Court on the evidence that Friedman had failed to establish a breach of warranty.

In the Friedman action, the District Court reaffirmed the

validity of the Brick Company claim and held that the Government test was not in conformance with A. S. T. M. specifications, in that the test was not made by a person appointed by the purchaser at a place designated when the purchase order was placed, and that, notwithstanding the agreement of Friedman to assume all the obligations of Johnson with respect to the work required by the subcontract and to be bound by all Government rulings and requirements to the same extent as Johnson, and to make the required tests of materials Friedman was entitled to recover from petitioners, because the Government breached its contract with respect to Johnson, and because Johnson could not avoid liability to Friedman because of the Government's breach (R. 182).

The Circuit Court of Appeals in the Friedman action, referred to its holding in the Brick Company case that the brick did conform to the specifications and that the condemnation and rejection of the brick by the Government, and the instruction of Johnson to Friedman based thereon, were wrongful, and further held that while, generally, Friedman was bound by the rulings and requirements of the Government, Friedman was not bound by the act of the Government in rejecting the brick, under the circumstances of this case, because the Government failed to comply with the specifications as to the time and place for testing the brick (R. 276).

Neither the District Court, nor the Circuit Court of Appeals gave any effect to the provisions of the Miller Act whereby the bond furnished by Johnson thereunder was declared to be for the benefit of persons supplying material used in Government work, and not for material condemned and rejected, nor to the provisions in the standard form of Government building construction contract, whereby the Government is given the right to reject defective materials during the course of construction, and whereby the rulings of the Contracting Officer with respect to fitness of material

were made final, and whereby the said materials were guaranteed for a year after final acceptance and whereby the subcontractor was bound by these provisions.

Both the District Court and the Circuit Court of Appeals, interpreting the A. S. T. M. specifications incorporated in the standard form of Government specifications with respect to the sampling and testing of brick, erroneously held that the Government was a purchaser of such brick so as to be required to sample and test the same before installation.

In this connection, the District Court and the Circuit Court of Appeals erroneously admitted and considered evidence of tests made by third persons and the testimony of a third person as to his opinion of whether the materials conformed to specifications, and accepted such evidence and opinion as controlling over the decision of the Government representative that the brick did not conform to specifications.

Questions Presented.

1. May a materialman recover under a Miller Act bond for the value of brick condemned by the Government and not used in the prosecution of Government work?

2. Under the standard form of Government construction contract, is the Government a purchaser of brick to be used in the erection of buildings, within the meaning of A. S. T. M. specifications, so as to require the Government to sample and test brick at the time the purchase order therefor is given by a subcontractor?

3. Does the Government by its failure to sample and test materials prior to installation, waive or lose its right, under the standard form of Government construction contract, to condemn defective material during the course of construction?

4. Under the standard form of Government construction contract, whereby the Contracting Officer shall decide all questions as to quality, acceptability and fitness of materials, and whereby all disputes concerning questions of fact shall be decided by the Contracting Officer, whose decisions thereon are made final,

- (a) May the Courts review the ruling of the Contracting Officer with respect to the fitness of materials?
- (b) Is evidence of a test made by third persons or the opinion of a third person admissible on the question as to whether materials conform to specifications, so as to overcome the contrary ruling of the Contracting Officer?

5. Where a subcontractor on Government work agrees to be bound by the rulings of the Government to the same extent as the general contractor and assumes all the obligations under the general contract with respect to such work, may the subcontractor recover from the general contractor for materials rejected and condemned by the Government and for work performed in removing such defective materials and replacing the same?

6. Is the provision in the standard form of Government construction contract, whereby a contractor guarantees his materials for a year after final acceptance, which provision is assumed by a subcontractor, waived by the Government by reason of the fact that it failed to sample and test materials before installation, although such materials were condemned as defective during construction?

7. Where the subcontractor agrees that the general contractor shall not be liable for additional cost of materials or extra work unless the general contractor receives payment

therefor from the Government, and the general contractor has not received such payment, may the subcontractor recover from the general contractor by reason of the fact that the Government improperly condemned material on the ground that it was defective?

Reasons for Allowance of Writ.

1. The Circuit Court of Appeals has erroneously construed the provisions of the Miller Act so as to make them applicable to a materialman whose material was rejected and not used in the prosecution of Government work.

2. The judgments of the Circuit Court of Appeals are contrary to the applicable decisions of this Court, and in conflict with the weight of authority, with respect to the finality of rulings by the Contracting Officer under the standard form of Government building construction contract with respect to quality, fitness and acceptability of materials.

3. The judgment of the Circuit Court of Appeals in the Friedman action is in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in *U. S. et al v. Madson Construction Company*, 139 Fed. (2d) 613; and in conflict with the weight of authority, with respect to the binding effect of the rulings of a Contracting Officer under a Government construction contract upon a subcontractor who agrees to be bound by such rulings.

4. The Circuit Court of Appeals has erroneously construed, or failed to construe, provisions of the standard form of Government construction contract with respect to the Government right to reject materials during the course of construction and with respect to the contractor's guaranty of materials in a way in conflict with applicable decisions of this Court, and in a way untenable and in conflict with the weight of authority.

5. The Circuit Court of Appeals has erroneously construed A. S. T. M. specifications which are standard Federal specifications for brick used on Government work, so as to hold the Government to be a purchaser of brick under the standard form of Government contract for the construction of buildings, in a way untenable and in conflict with the weight of authority.

6. The Circuit Court of Appeals has failed to give effect to the provision in the standard form of Government construction contract whereby the contractor is required to guaranty his work and materials for a year after final acceptance and replace materials found to be defective.

7. The Circuit Court of Appeals has failed to give effect to the usual provision contained in subcontracts for building construction, whereby the general contractor is not liable to the subcontractor for additional work unless he receives payment therefor from the Government.

Petitioners therefore pray that writs of certiorari may be allowed to review the judgments of said Circuit Court of Appeals and that writs may be issued to said Court directing that all the proceedings may be forwarded to this Court for review.

Dated, New York, May 1st, 1946.

Respectfully submitted,

JOHN A. JOHNSON & SONS INC.,
AMERICAN SURETY COMPANY OF NEW YORK

BY: EMANUEL HARRIS
Counsel for Petitioners.

